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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/759,529	01/20/2004	Masayuki Matsui	Q79426	7099
65565 7590 06/18/2007 SUGHRUE-265550 2100 PENNSYLVANIA AVE. NW WASHINGTON, DC 20037-3213			EXAMINER PADEN, CAROLYN A	
			ART UNIT 1761	PAPER NUMBER
			MAIL DATE 06/18/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/759,529	<b>Applicant(s)</b> MATSUI ET AL.	
	<b>Examiner</b> Carolyn A. Paden	<b>Art Unit</b> 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 01 May 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-25 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-25 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

The rejection of the claims over Loliger, Takeda and Sugihara under 35 USC 102 has been withdrawn in response to applicants' amendments to the claims.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3, 10 and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Knowlton (5,985,781) for reasons of record.

Knowlton discloses soybean oil having high oxidative stability. At column 5, lines 17-30, utility of the oil in confectionery foods are disclosed. At column 11, lines 48-52, the addition of 30 ppm citric acid is shown and at column 12, lines 18-24, the addition of 50 ppm citric acid is disclosed.

Applicant argues that Knowlton does not provide the features of the method by which citric acid is added. This argument has been considered but is not persuasive because the claims are directed to a product. The fact that the claims may have been made by a different method does not alone constitute unobviousness.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3, 10 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Knowlton 5,981,781) for reasons of record.

Knowlton discloses soybean oil having high oxidative stability. At column 5, lines 17-30, utility of the oil in confectionery foods are disclosed. At column 11, lines 48-52, the addition of 30 ppm citric acid is shown and at column 12, lines 18-24, the addition of 50 ppm citric acid is disclosed. The claims appear to differ from Knowlton in the recitation that the triglyceride is in the form of a fat. Oil and fat are known to be created from common triglyceride structures. One of ordinary skill in the art would recognize that an antioxidant added to fat would be at least as stable as an anti-oxidant added to oil.

Applicant argues that Knowlton does not provide the features of the method by which citric acid is added. This argument has been considered but is not persuasive because the claims are directed to a product. The

fact that the claims may have been made by a different method does not alone constitute unobviousness.

Claims 1, 4-16, 18-21 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Takeda in view of Loliger for reasons of record.

Takeda discloses shortening for chocolate. At column 4, lines 17-26, anti-oxidants such as citric and ascorbic acid are described as known additives for the shortening. The intended use of the chocolate in a coating does not carry any patentable weight. Also chocolate would be expected to be an emulsified food because it contains both oil and water-based ingredients. The claims appear to differ from Takeda in the recitation of the use of a particular amount of antioxidant in the composition. Loliger teaches a synergistic combination of anti-oxidants for the treatment of fats and oils that includes ascorbyl palmitate. The oil is combined with antioxidants dissolved in ethanol and then the solvent is eliminated by heating the mixture at 60C under a light vacuum (column 2, lines 40-48). It is appreciated that the amount of antioxidant in Loliger is different than that shown in the claims. But to adjust the amount of anti-oxidant used in a food would have been within the abilities of one of ordinary skill in the art. It is well known that the saturated fat or hard butter in Takeda is less

susceptible to oxidation than unsaturated, which is often oil. Thus one of ordinary skill in the art would not expect to need high amounts of anti-oxidants in such a fat. Further to modify the amount of anti-oxidant in Loliger would have been an obvious way to control fat oxidation for a limited and desired time.

Applicant has amended the claims to set forth a particular limited level of antioxidant. It is appreciated that the amount of antioxidant used in Loliger is higher than that of the claims but no unobvious or unexpected result is seen from the amount of anti-oxidant composition used in Takeda. One of ordinary skill in the art would be free to adjust the anti-oxidant content of the prior art according to the particular storage length desired in the final product.

Claims 1-3 and 5-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Loliger in view of Takeda for reasons of record.

Loliger discloses a synergistic combination of anti-oxidants for the treatment of fats and oils that includes ascorbyl palmitate. The oil is combined with antioxidants dissolved in ethanol and then the solvent is eliminated by heating the mixture at 60C under a light vacuum (column 2, lines 40-48). The claims appear to differ from Loliger in the recitation of the

use of the particular amounts of anti-oxidants that are used in the composition. But to adjust the amount of anti-oxidant used in a food would have been within the abilities of one of ordinary skill in the art. It is well known that the saturated fat or hard butter in Takeda is less susceptible to oxidation than unsaturated, which is often oil. Thus one of ordinary skill in the art would not expect to need high amounts of anti-oxidants in such a fat. Further to modify the amount of anti-oxidant in Loliger would have been an obvious way to control fat oxidation for a limited and desired time.

Applicant has amended the claims to set forth a particular limited level of antioxidant. It is appreciated that the amount of antioxidant used in Loliger is higher than that of the claims but no unobvious or unexpected result is seen from the amount of anti-oxidant composition used in Takeda. One of ordinary skill in the art would be free to adjust the anti-oxidant content of the prior art according to the particular storage length desired in the final product.

Claims 16-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pires for reasons of record.

Pires discloses an oil-in-water emulsion made to contain citric acid and fruit syrup that is used in a filling (see examples 1 & 2). Claim 17

appears to differ from Pires in the recitation of the use of the product in a beverage. It would have been obvious to one of ordinary skill in the art to include the creamy product of Pires in a beverage in order to create a milk-shake-like product.

Applicant has not separately argued the rejection. Accordingly no arguments need to be addressed. The amount of acid added to the emulsion would have been expected to depend from the extent of food preservation desired.

Claims 16-19 and 21-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dumoulin (5,958,503) as further evidenced by Lowe and in view of Takeda.

Dumoulin discloses fruit ganache having citric acid as an acidity regulator (abstract and column 3, lines 38-39). The product is made from sugar, fat, milk and fruit (column 4, lines 33-55). The claims appear to differ in the recitation of the inclusion of an oil in water cream composition. Lowe is relied upon for evidence that milk is an oil in water cream composition. The definition of an oil in water emulsion is shown at page 267, the fat in milk is described at page 296 and the effect of homogenization on milk fat globules is described on page 298. So one of



ordinary skill in the art, with the evidence of Lowe before him, would expect the fruit ganache of Dumoulin to have an oil in water cream composition within the milk ingredient (milk is typically consumed as a beverages) that is used the fruit ganache. It is appreciated that the specific amount of organic acid is not mentioned but the amount of organic acid in the product would have been within the determination of one of ordinary skill in the art, who desires to adjust the pH of the food.

Applicant argues that there is no indication in Dumoulin that the emulsified product is an oil-in-water cream composition. Claim 16 does not require that an oil in water cream composition. Claim 17 only requires that the emulsified product be oil in water composition. The claim does not require that the combination of a fat based confectionery and emulsified product be a oil in water composition. Applicant argues that one of ordinary skill in the art would not expect to use a fat with an organic acid to regulate the pH of the food. This has been considered but is not persuasive. It is well-known in the art to also utilize organic acids as anti-oxidants for fat, and Takeda is relied upon for support of this assertion. Even though Dumoulin does not use organic acids as anti-oxidants in fats, it would have

been obvious to preserve the fats of Dumoulin with the anti-oxidants of  
Takeda.

No claim is allowed.

*Carolyn Paden*

CAROLYN PADEN 1761  
PRIMARY EXAMINER 6-15-07